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667106—43

In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 377

BILL HUNNICUTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 89–92) is reported at 149 F. 2d 888.

JURISDICTION

The judgment of the circuit court of appeals was entered on June 29, 1945 (R. 92), and a petition for rehearing (R. 93–95) was denied on July 30, 1945 (R. 96). The petition for a writ of certiorari was filed on August 27, 1945. The jurisdiction of this Court is invoked under Section 204 (a) of the Judicial Code,

as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

Whether the conspiracy charged in the indictment was the same conspiracy of which petitioner had previously been convicted in the United States District Court for the Western District of North Carolina.

STATUTES AND REGULATIONS INVOLVED

Section 2 (a) of the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (55 Stat. 236), and by Title III of the Second War Powers Act of March 27, 1942 (56 Stat. 177), 50 U. S. C. App., Supp. IV, 633, provides in part:

> (2) * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> (5) Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether heretofore or here-

after issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

(8) The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

General Ration Order No. 8, issued by the Office of Price Administration March 25, 1943, as amended (8 F. R. 3783, 9 F. R. 1325, 2746), provides in part:

§ 2.5 *Acquisition, use, transfer or possession of counterfeited or forged ration document.* (*a*) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

§ 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

> § 2.8 *Wrongful acquisition, possession, use or transfer of rationed commodity.* No person shall acquire, possess, use, permit the use of, sell or otherwise transfer a rationed commodity except in accordance with the provisions of a ration order. No person shall possess, use, permit the use of, sell or otherwise transfer any rationed commodity acquired in violation of a ration order.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

On November 29, 1944, petitioner and Clyde Ramey were indicted in the United States District Court for the Northern District of Georgia in one count charging that, together with one Claude Guest, who was not indicted, and other persons unknown to the grand jury, they conspired to violate Section 2 (a) of the Second War Powers Act, in violation of Section 37 of the Criminal Code, *supra.*

The indictment charged, in substance, that commencing on January 1, 1944, and continuing to the date of the indictment, within the district and "at divers other places to the Grand Jurors unknown,"

the conspirators unlawfully agreed to acquire rationed sugar in a manner forbidden by Sugar Ration Order No. 3 and General Ration Order No. 8. Twenty-two overt acts were alleged, which detailed two transactions on February 10 and March 18, 1944, in which the conspirators undertook to acquire and did acquire 30,000 pounds of sugar through the use of counterfeit sugar ration stamps. (R. 1–7.)

The evidence at petitioner's jury trial, briefly stated, established that on two occasions, one on February 10, 1944, and the other a few weeks later, petitioner, pursuant to arrangements made with Guest, furnished him with sugar ration coupons and money for the purpose of acquiring rationed sugar (R. 51–54, 57–60); that the ration coupons were counterfeit (R. 72–73); that Guest purchased 30,000 pounds of sugar from a wholesale dealer in Toccoa, Georgia, falsely representing that the sugar was for two local stores (R. 33–37, 39–40, 42–50, 51–54); that the sugar was transported from the seller's place of business in trucks furnished by petitioner (R. 51–53); and that defendant Ramey assisted Guest in acquiring the sugar (R. 43–45, 53). The jury acquitted Ramey, but convicted petitioner (R. 8), and he was sentenced to imprisonment for two years and to pay a fine of $10,000 (R. 8–9). Upon appeal to the Circuit Court of Appeals for the Fifth Circuit, the judgment was affirmed (R. 89–92).

The sole question presented by the petition for a writ of certiorari relates to petitioner's special plea of double jeopardy (R. 10–18), which he filed before

pleading to the merits, urging that he had previously been convicted of the same conspiracy in the United States District Court for the Western District of North Carolina. The Government's motion to strike the plea on the ground that it was clear from the face of the two indictments that different offenses were involved, was overruled (R. 18–19), and the court impaneled a special jury to try the issue presented by the plea (R. 19).

The court received in evidence a copy of the North Carolina indictment and of the minutes of the North Carolina district court (R. 12–19). That indictment (R. 14–18) charged that during the period from November 1, 1943, to November 13, 1944, within the Western District of North Carolina, petitioner and seven other named persons, not including either Guest or Ramey who were named as conspirators in the Georgia indictment, unlawfully conspired to violate Sugar Ration Order No. 3 and the Second War Powers Act by purchasing and selling rationed sugar through the use of counterfeit sugar ration stamps. Seven overt acts were alleged describing various transactions on or about January 1, 1944, in which vast quantities of sugar were bought and sold illegally. Overt act VI, which related to petitioner, charged that on or about January 1, 1944, he illegally acquired 100,000 pounds of rationed sugar in exchange for counterfeit ration coupons (R. 18). Petitioner pleaded *nolo contendere* to the North Carolina indictment, and the court, after hearing evidence, entered judgment that petitioner pay a fine

of $3,000; execution of a sentence of one year and a day was suspended, and petitioner was placed on probation for two years (R. 13–14).

The only other evidence adduced at the trial of the special plea was petitioner's testimony that the only witness in the North Carolina case who connected him with the conspiracy involved there was one Underwood, who was a co-defendant in that case (R. 21). According to petitioner, Underwood testified in the North Carolina case that at times before January 1, 1944 (R. 21), petitioner, on one occasion in North Carolina and on another in Georgia, furnished Underwood with counterfeit sugar ration coupons and that Underwood, using the coupons, purchased between 50,000 and 80,000 pounds of sugar in North Carolina and delivered it to petitioner in Georgia (R. 21–27). Petitioner testified that there was no evidence in the North Carolina case relating to his transactions with Guest and Ramey, who were charged as co-conspirators in the Georgia indictment, and upon being questioned *seriatim* as to each of the twenty-two overt acts alleged in the Georgia indictment, he testified that there was no evidence in the North Carolina case as to any of these transactions (R. 27–30).

On this evidence the trial court held as a matter of law that petitioner had failed to show that the offenses charged in the North Carolina and Georgia indictments were identical, and accordingly directed the jury to return a verdict against the plea (R. 33).

ARGUMENT

We are unable to agree with petitioner (Pet. 14–17) that the offenses charged in the North Carolina and Georgia indictments are identical or that the district court erred in directing the jury to find against petitioner's special plea of double jeopardy. It does appear from the face of the indictments that they are similar in that they cover substantially the same period of time and the object of the conspiracy in each case was to procure rationed sugar through the use of counterfeit sugar ration stamps. On the other hand, the North Carolina indictment fixes the Western District of North Carolina as the situs of the conspiracy involved in that case, while the instant indictment recites that the conspiracy existed in the Northern District of Georgia and at "divers other places to the Grand Jurors unknown," and the overt acts alleged, with one exception,[1] occurred in Georgia. Likewise, with the exception of petitioner, there is a complete lack of identity between the conspirators named in the two indictments. Further, the North Carolina indictment recites overt acts alleged to have occurred in North Carolina on or about January 1, 1944, while the Georgia indictment alleges overt acts which occurred in Georgia in February and March 1944. There is no need, however, to rely upon these

[1] Overt act 16 recites that Ramey delivered to Guest the sum of $65.00 to be used in purchasing sugar for petitioner, but it fails to fix the locale of the transaction (R. 6). The evidence adduced at the trial showed, however, that this, too, occurred in Georgia (R. 52–54).

differences alone to support the conclusion that the two indictments relate to distinct conspiracies, for, in our view, petitioner's testimony at the hearing in this case on the plea of double jeopardy conclusively demonstrates that each indictment involved a different unlawful agreement between different persons and that different overt acts were committed in execution of the conspiracies.[2]

The evidence which we have summarized, *supra*, pp. 6–7 shows that petitioner's connection with the North Carolina conspiracy was solely through Underwood, a defendant in that case. At some time prior to January 1, 1944, petitioner furnished Underwood counterfeit stamps and Underwood procured the sugar from his co-conspirators in North Carolina and delivered it to petitioner. Petitioner specifically denied that Ramey or Guest were shown to be members of the North Carolina conspiracy or that any of the evidence in that case related to the transactions alleged as overt acts in the Georgia indictment. And, conversely, there is absent from the proof in this case any evidence linking any of the North Carolina defendants, except petitioner, or any of the trans-

[2] This is implicit in petitioner's testimony that he was a member of the North Carolina conspiracy (R. 21) and that he had never conspired with Guest or Ramey, as charged in the Georgia indictment (R. 75). If Guest and Ramey were not co-conspirators with petitioner in the North Carolina case, as must be inferred from petitioner's testimony that he never conspired with them, it hardly can be said that the Georgia indictment charged the same offense as the North Carolina indictment.

actions involved in the North Carolina case with the conspirators or transactions upon which petitioner's Georgia conviction is predicated. In these circumstances, we think it plain that the events, the time, and the parties are different in each case. The evidence in the North Carolina case that before January 1, 1944, petitioner delivered counterfeit stamps to Underwood and that Underwood procured the sugar in North Carolina would not have established the conspiracy charged in the Georgia indictment, and the evidence showing the Georgia conspiracy (*supra*, p. 5) would not have supported a conviction under the North Carolina indictment. Since, in our view, the evidence permitted only one conclusion, we think the district court properly directed the jury to find against petitioner on his special plea of double jeopardy.

Petitioner is mistaken in his belief (Pet. 11) that the decision below is in conflict with *Short* v. *United States*, 91 F. 2d 614 (C. C. A. 4). In that case, the Circuit Court of Appeals for the Fourth Circuit found an issue of fact to exist as to the identity of the two conspiracies involved, and it accordingly held that the issue should have been submitted to the jury.[3] Since in this case, as we have shown, the evidence left no doubt as to the distinctness of the two conspiracies and since there was no conflicting

[3] In the *Short* case, overt acts in North Carolina were alleged in the indictment returned in Virginia and vice versa. Moreover, two identical defendants were named in both indictments.

evidence, the district court properly directed a verdict against petitioner's plea.[4]

CONCLUSION

For the reasons stated, we respectfully submit that the affirmance of the judgment of conviction by the court below was free of error. The case presents no conflict of decisions or important issue of law, and the petition for a writ of certiorari should therefore be denied.

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SEPTEMBER 1945.

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[4] Neither *United States* v. *Bates*, 141 F. 2d 436 (C. C. A. 7), remanded for further proceedings, 323 U. S. 15, nor *Marcus* v. *United States*, 20 F. 2d 454 (C. C. A. 3), which petitioner asserts are also in conflict with the decision below (Pet. 11), involved a question of identity of offenses such as is presented by this case.

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